

1996

Stichting Mayflower Recreational Ponds v. County Board of Equalization of Wasatch County : Petition for Rehearing

Utah Court of Appeals

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Stichting Mayflower Mountain
Fonds, Stichting Mayflower
Recreational Fonds, Utah
State Tax Commission,

Respondents/Appellees,

vs.

County Board of Equalization of
Wasatch County,

Petitioner/Appellant.

App. Ct. No. 960280-CA

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INTRODUCTION

The Utah Constitution permits a partial property tax exemption for “land used for agricultural purposes.” *Utah Const.* Art. XIII § 3(2). Unless the land is “used for an agricultural purpose,” the Constitution does not permit the Legislature to grant an exemption.

Pursuant to this constitutional authorization, the Legislature adopted the Farmland Assessment Act (“FFA”) creating an exemption for agricultural property. To qualify for the exemption, the land must be used for an agricultural purpose. *Salt Lake County v. Tax Commission* (Bell Mountain), 819 P.2d 776, 778 (Utah 1991). And, after 1992, the landowner had to show that he used 50% of the agricultural capacity of the land. *Utah Code Ann.* § 59-2-102(1). The instant case involves the application of these two requirements to land owned by Mayflower in Wasatch County.

Mayflower’s property straddles U.S. 40 near the new Jordanelle Reservoir. The property consists of four parcels: (1) the North Property, (2) East Park Subdivision Property, (3) the Density Determination Property, and (4) the Mayflower Property (other). The Mayflower “other” property is west and south of the other parcels and was blue shaded on a map offered in evidence, and used by Gillmore to identify the areas grazed.

In this appeal, the County challenged the Tax Commission ruling that the Mayflower “other” property was devoted to an agricultural use when the herder actively tried to keep the animals out of the area. Alternatively, the County argued that, if the “other” property was put to an agricultural purpose, then Mayflower could not satisfy the production requirements of the FAA for any of its property.

In resolving these issues, the Court first determined that, under the FFA, Mayflower's

"other" property was "actively devoted to an agricultural use" even though use was accidental and unintentional. *County Board v. Stichting Mayflower et al*, Case No. 960280-CA Slip Op. at 10-11 (July 25, 1997). Second, the Court held that the "other" property, when treated separately from the Mayflower's remaining parcels, did not satisfy the production requirements of the FAA. As a result, the Mayflower "other" property was removed from greenbelt.

In response to this Court's ruling, Mayflower filed a Petition for Rehearing seeking reconsideration of the second of the two rulings. It claims that the Court's ruling improperly contradicts the Tax Commission's factual findings, and makes unsupported factual findings. To support these claims, Mayflower refers to numerous extraneous facts that have no real bearing on the Court's decision, and in so doing it fails to draw into question the Court's ruling.

ARGUMENT

I. Granting Mayflower's Petition Would Result In All Mayflower's Property Being Removed From Greenbelt.

Mayflower argues that this Court erred in treating the Mayflower "other" property as separate and distinct for the purposes of the post-amendment production requirements. Assuming that this error occurred, it would not further Mayflower's cause. Including the additional acres from the "other" property, without an proportionate increase in usage, makes Mayflower's usage for all Mayflower property insufficient to satisfy the post-amendment production requirement. *See Brief of Appellant* at Part II, p. 33 *et seq.* and *Reply Brief of Appellant* at Part II, p. 16 *et seq.* Mayflower's Petition for Rehearing provides no basis for concluding that the production requirement could be met if Mayflower's usage had to equal 50% of the grazing capacity of all Mayflower.

This Court's decision recognizes Mayflower's dilemma when it stated:

According to Gillmore, the North Property and the Property Subject to the Density Determination were being used to the extent of fifty percent of their capacity. However, he admitted that the use of the "other" property, which led up to the Bonanza Flats area, had been used substantially less than its capacity to graze animals, due to the change in conditions, i.e., the growth in the domestic dog population in and around the area leased to Deer Valley.

Mayflower, Slip Op. at 4. Thus, if the Court were to grant Mayflower's petition, the remedy would be to remove all of the property from greenbelt.

II. The Court of Appeal's Factual Statement Is Consistent With The Tax Commission's Factual Findings And The Undisputed Facts.

The Court's decision correctly states that, at all times material to this case, the herder, Luke Gillmore, tried to keep his animals off of Mayflower's "other" property to avoid the menace of domestic animals. It also properly recognized that, despite the herder's best efforts, some animals occasionally wandered onto the "other" property, the ski slopes, and property not under lease to Gillmore, but were quickly rounded up and returned. These facts are virtually verbatim from the record in this appeal. *See Appellant's Brief* at pp. 27-32 where pertinent portions of transcript are quoted at length.

Not only is the Court's factual statement consistent with the record, it is indistinguishable from the Tax Commission's findings. In its Reconsideration Order, the Tax Commission stated: "Mr. Gillmore did attempt to keep them from the area because of the encroachment of civilization, including dogs which chase the animals." *Reconsideration Order* at p. 3 [R. 3A]. The Tax Commission also found that "some of the sheep and cattle may have wandered onto that property from other property," *Findings of Fact, Conclusions of Law and Final Decision* ("Decision") ¶ 16, p. 8 (emphasis supplied) [R. 91], and that the "the animals did occasionally graze that area." *Reconsideration Order* at p. 3 (emphasis supplied) [R. 3A]. In addition, at oral

argument, the Tax Commission's counsel stated that these references were to the Mayflower "other" property in blue on the map and not some smaller area as had been suggested by Mayflower's attorney.

In light of the foregoing, Mayflower cannot reasonably contend that "the facts cited by the Court at all crucial points are at variance with the findings of the Tax Commission, and otherwise unsupported by the evidence." *Petition for Rehearing* at 1.

III. Mayflower's Claim Of Grazing On Canyons and Slopes Within Mayflower's "Other" Property Has No Support In the Record And Has Been Raised And Rejected By The Court.

The facts critical to the Court's decision do not relate to steepness of the terrain nor to contiguousness of the various parcels nor to the availability of water. The critical fact is that Gillmore made every effort to keep the animals out of the "other" property, because of the threat of domestic dogs.

In the Petition for Rehearing, Mayflower's only challenge to this fact is that Gillmore grazed animals on some undefined portion of the "other" property. This argument however is simply a restatement of arguments raised in Mayflower's original brief and rejected by this Court. *Compare Mayflower Brief* at 4, 8, & 13 with *Mayflower Rehearing Petition* at 11-14. Mayflower's citations to the record do not support this contention. *Mayflower Brief* at 4, 8, & 13 citing Tr./Gillmore at 22-27, *Mayflower Rehearing Petition* at 11-14 citing Tr./Gillmore at 26-27. Rather the testimony makes clear that Gillmore was unable to use the land within the blue shaded area known as the Mayflower "other" property because of the incursion of domestic dogs.

Pertinent portions of Gillmore's testimony on grazing on Mayflower's "other" property focus on Exhibit 2, a map of the Mayflower property before the condemnation and construction

of the new US 40. A copy of this exhibit is attached to this brief.

On this map, a blue shaded area is identified as "Mayflower Properties (other)." This blue shaded area has significance because Gillmore identified the blue area as the area that he tried to keep his animals out of. This area is south and west of the density determination area and is referred to by the Court in its decision as the Mayflower "other" property and by the County in its earlier brief as the "South Mountains." Included within the blue shaded area is Bonanza Flats. (Tr./Gillmore at 23)

Gillmore's testimony about his inability to use the areas within the blue shaded area, the Mayflower "other" property or South Mountains, is unequivocal.

Gillmore Testimony (Direct examination) p. 22 l. 17 to 27 l. 5.

Q Looking at the property which is toward the bottom part of the drawing which is Exhibit D-[2], you will see some that's shaded in blue; do you see that?

A Yes.

Q And it's described as Mayflower properties other. Are you familiar with that property?

A Yes.

[Testimony deleted]

Q In the ordinary year, do you move the sheep up the mountain side towards Bonanza Flats?

A We haven't been, for a number of years.

Q And why has that been the case?

A We had a lot of problems when we had the sheep up there with -- first of all, there's -- there's only one small spring on this blue area, that's not sufficient to water a large herd of sheep and the sheep have to go off, like at this Midway Reservoir or somewhere. And we had -- it was hard to keep the sheep on there, and -- but more so, we had a lot of problems with wild -- or domestic dogs that were coming from Park City and attacking the sheep.

Q Okay.

A And then also, we, as time went on, from this State park, there's a lot of people up there and a lot of people use this property for recreation and it's -- it's hard to graze the sheep in there when there's so many people just doing all sorts of different types of recreational activities.

Q When did that, (inaudible) you've just described, the dogs, for example, or the people engaged in recreational activities, when did that become a serious interference with putting sheep in those areas?

A Well, it was, right at the time when we had sheep up there in the -- in the latter part of the '80's, and it's just -- it -- the last couple years that we actually had sheep camp up there and it became so we figured it was more problem than it was worth to try and graze on it. With the -- you know, with the whole herd.

We still have stock that periodically have come up onto the -- came up these canyons, especially sheep, because sheep's natural tendency is to climb up and through all the years, we've periodically had to come up onto this blue area and bring back sheep that have strayed off and gone up.

Q Gone up on their own?

A Yes.

[Testimony deleted]

Q Okay. Now when sheep get into this area, what becomes of them?

A Well, we go get them and take them back down onto this other property?

Q How often does that occur?

A Not real often, as it depends on how good our herder is, or how good I — or how good we — we herd them, ourselves.

Q Over the last few years, is there a way of estimating how many sheep there would have been grazing in that upper blue area from time to time?

A Well, it's hard to put an exact figure on it, because it's periodically different bunches that go up there and then they're — as soon as we find out their gone, we go get them and — and take them back down, so. . .

Q Some of the pieces that we are shown here in blue are not physically contiguous; did that ever prevent you using those areas?

A Not the contiguous part. There — this — these pieces down here are in a real steep, treacherous canyon area and it's hard to get sheep on to them, and they're pretty limited grazing value.

Gillmore Testimony (Direct examination) p. 31 l. 5 to 31 l. 13.

Q Looking at the blue area on this map that we've described before, the more mountainous terrain extending up toward Bonanza Flat; do the cows use that property for grazing?

A Very little. But cattle do sometimes climb up these canyons.

Q What do you do when that happens?

A Well, we usually get a phone call, like from Deer Valley and have to go -- to go get them and drive them back. using those areas?

Gillmore Testimony (Cross examination) p. 73 l. 16 to 74 l. 1.

Q Okay. Thank you. I think your testimony was that on the west side across -- on the west side across the Mayflower interchange, if you will, that the animals primarily stayed within the little bowl -- or not -- I shouldn't say li.t.e, but in - within that bowl that's right on the west side of the road; is that correct? Right around the mine area?

A Up -- by the confines where I've outlined it on the map, yes.

Q Okay. You'll get some that will graze up, or higher, but you have to bring those back into that area; is that correct?

A Yes.

Contrary to Mayflower's assertion, this testimony establishes that Gillmore tried to keep the animals off of the entire Mayflower "other" property, the area shaded in blue. In fact, at oral argument, in response to Judge Orem's question, the Tax Commission's counsel conceded that Gillmore tried to keep his animals off of the entire blue shaded area.

IV. This Court's Treatment Of The Mayflower "Other" Property As Distinct And Separate Shows That The "Other" Property Is Not "Land Actively Devoted To An Agricultural Purpose" Under *Bell Mountain*.

This Court chose to treat the Mayflower “other” property differently from the remaining property because Gillmore chose to treat the “other” property differently. The Court held:

The "other" property is ... not grazed like the remaining parcels, in light of the substantial efforts made to keep the livestock out of the "other" property. Indeed, if the "other" property were fenced off and rendered completely unavailable to Gillmore Livestock's sheep, it would not adversely affect the grazing operation in any way.

Slip Op. at 13-14. In fact, such a fence would have helped the operations since Gillmore would not have had to go to the trouble of retrieving straying sheep.

The Court, in part, justified its analysis by reference to the Utah Supreme Court's decision in *Salt Lake County v. Tax Commission* (Bell Mountain), 819 P.2d 776 (Utah 1991). Although *Bell Mountain* supports treating the "other" property separately in determining production, its holding more properly supports the conclusion that the "other" property was "land actively devoted to an agricultural purpose" under the pre-amendment statute.

In *Bell Mountain*, the Utah Supreme Court analyzed the issue of whether a given parcel of land was “actively devoted to an agricultural purpose” under the pre-amendment statute and the Utah Constitution. There, the Court provided the following guidance for analyzing the use issue:

This acreage is not reasonably required for the purpose of maintaining the land actually grazed, nor does it in any way support activity on that land. Under these circumstances, it cannot be successfully maintained that such acreage is in agricultural use . . . We do not believe that it was the intent of the constitutional authorization in article 13, section 3(2) and of the implementing statutes that tracts not in actual agricultural use could be bootstrapped onto a core of agricultural property and thereby spread the preferential tax assessment to a wide area.

Id. at 779-80.

In its discussion of *Bell Mountain*, this Court showed clearly that that case and the instant case are virtually indistinguishable. This Court stated:

In Bell Mountain, the Court stated that the 331 acres of steep and inaccessible land, which was considered distinct from the remaining 100 acres and ultimately denied greenbelt assessment, was not reasonably required to support any activity on the remaining 100 acres actually grazed, nor did it support any activity on those 100 acres. See 819 P.2d at 779. Similarly, the acres making up the "other " property in this case, although grazed in the past with the other parcels of Mayflower's land, is not now reasonably required for the purpose of maintain the North Property or the Property Subject to the Density Determination, nor does it support in any way activity on those parcels. These geographic and qualitative factors compel the conclusion that the "other" property should have been considered separately from the remaining parcels in determining whether it met the amended production requirement.

Although this Court used the comparison to support separate treatment for the production requirement, this analysis also compels a finding of the absence of agricultural use in the "other" property. No good reason exists for applying a different definitions to the agricultural use requirement and to the production requirement.

The Court's reference to a fence is useful in considering the agricultural use requirement.¹ In essence, the herder's grazing plan, though not an actual physical barrier, created a barrier to keep the animals off of the "other" property much like a fence. If the herder had, instead, constructed a fence, some sheep would have undoubtedly gotten over or under it. In the case of a physical barrier, the Court would not have concluded that the land outside the fence was actively

¹ The Court states: "Indeed, if the 'other' property were fenced off and rendered completely unavailable to Gillmore Livestock's sheep, it would not adversely affect the grazing operation in any way." *Mayflower*, Slip Op. p.14.

devoted to an agricultural purpose even if a few sheep cleared the fence. No reason thus exists to treat the “other” property as being used for agricultural simply because a few sheep escaped the non-physical barrier.

In finding agricultural use on the "other" property, this Court stated that "the express language of the FAA . . . contained no language relating to the intention of the landowner or lessee." *Mayflower*, Slip Op. p.11. The Utah Constitution Article XIII § 3(2) however only permits the exemption for "[l]and used for agricultural purposes." Similarly, the pre-1993 Act limits the exemption to land "actively devoted to agricultural use." Utah Code Ann. § 59-2-503(1)(b) (pre-1993). In both the pre- and post-1993 versions of the Act, the Legislature provided that "[l]and in agricultural use" means "land devoted to the raising of useful plants and animals." Utah Code Ann. § 59-2-502(1)(a) (pre- & post-1993). The constitution's and statutes' critical terms, "actively," "devoted," "use," "agricultural," and "purpose,"² on their face, require that the use, at a minimum, be purposeful.

As shown in the instant case, an overly broad definition of “agricultural use” makes compliance with the amended production requirements, more difficult. The more land in agricultural use, the more grazing animals are required to satisfy the statute’s production requirements. A realistic definition of use permits the herder to limit the acreage to the areas he really intends to use.

² The Webster's New Collegiate Dictionary (1977) defines: (1) "active" as "characterized by action rather than contemplation or speculation . . . expressing action as distinct from mere existence or state . . . marked by vigorous activity," (2) "devote" as "to give over (as to cause, use, or end) wholly or purposefully, <land devoted to agriculture>," (3) "use" as "the act or practice of employing something," (4) "purpose" as something set up as an object or end to be attained: INTENTION," and (5) "agriculture" as "the science or art of cultivation the soil, producing crops, and raising livestock."

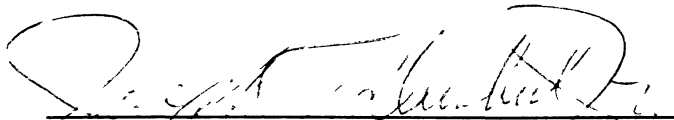
V. Mayflower's Failure To Support Its Factual Challenges With Record Citations Requires Rejection Of Its Petition.

Mayflower spends a substantial portion of its brief attempting to find errors with the Court's factual recitation. For the most part, Mayflower's argument contains no citation to the portions of the record supporting its version of the facts. Mayflower's failure to cite to the record provides adequate grounds for rejecting Mayflower's petition.

CONCLUSION

For these reasons, the Court should deny Mayflower's Petition for Reconsideration. The Court's factual statement is consistent with and supported by the factual finding of Tax Commission and the record on appeal. Additionally, combining all the Mayflower property would simply result in all Mayflower property being removed from greenbelt because Mayflower has not shown that it has used 50% of the grazing capacity of the entire Mayflower acreage. Finally, if the Court rehears this matter, it should correct its finding on the agricultural use issue to make the Court's ruling consistent with the *Bell Mountain* decision.

DATED this 30th day of September, 1997.



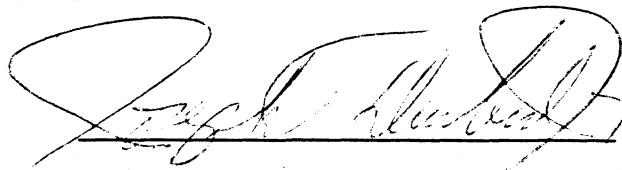
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CERTIFICATE OF SERVICE

I hereby certify that, on September 30, 1997, I mailed, postage prepaid, two copies of the foregoing Appellant's Response to Petition for Rehearing to the following:

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A handwritten signature in black ink, appearing to read "Joseph H. Hunsaker", written over a horizontal line.

